# ANOTHER PHILIPPINE CONSTITUTIONAL QUESTION—DELEGATION OF LEGISLATIVE POWER TO THE PRESIDENT.

THE Philippine Islands became the property of the United States on April 11, 1899, but Congress has as yet passed no laws for their government, or for the protection or regulation of the personal or property rights of their inhabitants.[1] They have been governed by the President in monarchical form. He has not only executed the existing laws of the islands, but has legislated also; and without authority from Congress he has sent there a legislative body consisting of five Commissioners, who discuss and pass bills, and report to him through the Secretary of War.

Whatever validity his legislative acts may have is derived from the fact of an insurrection throughout the greater portion of the islands, which was already in existence on April 11, 1899, and which is still pending. Before that date, when the islands belonged to Spain, he had the full power of a military conqueror; and a military conqueror in foreign territory, even under our form of government, is not obliged to respect the theoretical division of responsibility between legislative, executive and judicial powers. The President, as Commander-in-Chief, may even go to the extent of providing a complete new code of laws, regulating the personal and property relations of his temporary subjects, as well as their governmental system.[2] Whether he has had the right to go to this full extent since the territory has been transferred to us by treaty, and has become domestic, is a matter of doubt; but even in domestic territory, during the pendency of an armed insurrection there, he may exercise many of the powers of a military conqueror, legislating at least so far as to set up a temporary

[1] The only legislation other than for our army and navy is a very small appropriation for postal service (31 Stat., 252).

[2] Leitensdorfer *vs.* Webb, 20 How., 176, 178; Cross *vs.* Harrison, 16 How., 164, 190.

government of martial law, ignoring many constitutional rights, and maintaining a court system and taxation system of his own contrivance.[1]

We have received information, however, that all resistance to our forces in the islands would cease on November 7, 1900. While the exact date seems not to have been observed, we nevertheless hope for a speedy return of peace, when martial law and military despotism shall end; yet Congress has so far made no provision for the subsequent government of the islands.

Such a provision was proposed at the last session of Congress by Senator Spooner of Wisconsin. His proposition was understood to have the approval of the administration, and is commonly known as the Spooner Bill. It was introduced by him on January 11, 1900, was reported with approval by the Committee on the Philippine Islands, and became the regular order of business in the Senate on April 4. It remained the regular order thereafter, but was laid aside on special motion almost every day, and, while a few speeches were made about it, the session ended on June 7 without any action. On December 4, the first working day of the next and now pending session, it was displaced to make way for a subsidy bill, and is no longer the "unfinished business"; but it is still the only scheme of government for the Philippines which has had any serious backing in Congress.

The law proposed by Senator Spooner was to go into effect when the insurrection "shall have been completely suppressed." It was to remain in operation "until otherwise provided by Congress," in other words, for as long as any other statute. It delegated to the President and his appointees the entire legislative and judicial power, so far as "necessary to govern" the islands. The islands were not to be governed through a scheme of legislation devised by Congress, as is the case with New Mexico, Arizona, Oklahoma, Alaska, Hawaii and Porto Rico, but they were to be governed like a British Crown Colony—in other words, like a conquered country in military occupation.

The question will at once occur whether this monarch-

[1] Texas *vs.* White, 7 Wall., 700, 730; The Grapeshot, 9 Wall., 129; Mechanics' Bank *vs.* Union Bank, 22 Wall., 276.

ical form of government is to be altogether unhampered by constitutional restrictions—whether the Filipinos are to be unprotected by the Bill of Rights, by the provision for uniformity of taxation, and by the other guaranties of the Constitution. This I do not intend here to discuss.[1] If these constitutional guaranties operate in the Philippine Islands, and are available to the Filipinos, Congress is subject to them in all its legislation. It cannot delegate to the President any greater or more unrestricted legislative powers than it possesses itself. The President therefore would be equally bound.

The question which I propose to discuss in this article is whether Congress has authority to delegate its legislative powers to the President, and cast upon him its legislative responsibilities; a question which has been under discussion for a century past, although never before our late war, except perhaps in one very temporary emergency, has it been even seriously proposed to confer upon him such a sweeping jurisdiction.

I do not, however, intend to argue that it would be inadvisable, if constitutional. On the contrary, I think that the arguments in favor even of the most complete delegation of legislative power are so weighty that they should receive respectful consideration. They may be stated under three heads.

First, the precedents are in its favor. We have no colonial precedents of our own that are of any great value, because we have never before annexed a settled and populous country of alien tongue and traditions. A most effective argument in favor of our ability to govern such a country with mutual satisfaction and the approval of the

[1] The legislative, executive and judicial precedents are collected by the writer, and the ablest discussions referred to, in an article on "The Porto Rico Tariffs of 1899 and 1900," *Yale Law Journal*, May, 1900. Since then there has been a decision by Judge Townsend of Connecticut (Goetze *vs.* United States, 103 Fed. Rep., 72), now, with certain unreported decisions, before the Supreme Court for review. There have been a number of decisions by the Supreme Court of Hawaii upon these points (Peacock *vs.* Republic of Hawaii, 12 Hawaii, 27; Republic *vs.* Edwards, *Id.*, 55; Honomu Sugar Co. *vs.* Sayewiz, *Id.*, 96; *ex parte* Edwards, decided Oct. 9, 1900; Territory of Hawaii *vs.* Marshall, decided the same day). The whole subject is discussed by C. F. Randolph in his work on "The Law and Policy of Annexation," now in press. Some analogous questions arising out of our anomalous occupation of Cuba are now under advisement by the Supreme Court in the case of Neely *vs.* Henkel.

civilized world has been the success of Great Britain in doing this same thing. It is therefore in order to examine the method which Great Britain uses under similar circumstances;[1] and if we find that method to be one permitted by our Constitution, the burden of proof may be considered as upon those who urge that it be disregarded, and that some novel and untried system be substituted. Parliament recognizes that home affairs deserve its first attention, and are varied enough to occupy its time, and it does not attempt to provide the necessary legislation for the British colonies or dependencies. For those which have attained such a position that they are entitled to govern themselves, Parliament provides an enabling act which is practically a constitution, and thereafter interferes no longer. Until a colony has reached the stage of self-government—so long as it is in the position of the Philippines—its legislation is not enacted by Parliament, but by the Crown in Council. A new colony acquired by conquest or cession comes as a matter of course under the jurisdiction of the Crown in Council, although the Crown cannot make laws "contrary to the fundamental principles" of English law, or, as we should say, its legislation must be constitutional.

Second, it is a matter of doubt whether our legislative machinery is such as to yield the best results in the present situation. The problems presented are very delicate, very difficult and very complex. The amount of legislation which will be required by these numerous islands with their varied population and civilization is probably great. It should be drafted by persons who have familiarized themselves with all of the conditions on the spot—persons familiar with the language, history, customs, traditions, prejudices and manners of both Spaniard and Malay. Even were these conditions fulfilled, missteps must be expected—missteps which it will be to the interest of all parties quickly to retrace. Congress is not in session all the time, and it can pay but a small fraction of its attention to trans-oceanic difficulties. But few persons can be possessed of the fund of information necessary as a basis for proper legislation, and those persons cannot easily be brought into contact

[1] See Anson's Law of the Constitution, 2d ed., vol. ii., p. 264, *et seq.*

with the working committees at Washington. However important it may be to push through rapidly some piece of legislation, it will be antagonized with every kind of domestic question, as well as with the affairs of Porto Rico, Hawaii and Nicaragua, not to speak of the oppressed of other countries who may receive legislative sympathy. Deadlocks must thus be expected, even in the present unusual situation, when the President has a working majority of supporters in both branches of Congress. It is quite possible that this situation will terminate on March 3d, 1903, and that we may enter another period of normal legislative deadlock, like that which lasted with slight interruption from 1875 to 1897. If the Spooner bill be passed, it will be within the power of the present and each succeeding President to keep a commission of trained experts at Manila, who may continue to legislate for the benefit of the Philippine Islands until the inhabitants of those islands are themselves prepared to take up the work, and then depute to a native or partly native assembly such portions of the legislative power as may be best, subject, of course, to the power of Congress to step in and establish a permanent territorial government in the islands.

Third, if Congress, deeming it inadvisable at present to grant legislative autonomy to the islands, attempts to do what Parliament has never attempted to do, namely, provide the necessary legislation itself, then we must be the sufferers, for the proper discharge of the duties thus assumed will take up months of every congressional session, and measures in which we are more immediately interested must stand aside, just as at the last session of Congress the Spooner bill, although it came to nothing, crowded out the Nicaragua Canal bill and other measures of public interest. There is certainly considerable force in the contention that it would be better for us, as well as for the Filipinos, if President McKinley until 1905, and his successor thereafter, whoever and of whatever party he may be, can have the sole power and sole responsibility of legislating for these islands.

But can this power and this responsibility be placed upon them?

Our government is divided into three branches, execu-

tive, legislative and judicial. Its theory is that each branch shall perform its own functions, and not delegate them to the other. The maxim that the Legislature cannot delegate the power to make laws is as old as Locke.[1] Judge Cooley who has treated it more fully than any other text writer of authority, says: "One of the settled maxims in constitutional law is that the power conferred upon the Legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain, and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."[2]

The United States Supreme Court has recognized the maxim from an early date, and it received the endorsement of all the judges in Field *vs.* Clark, the leading case on this subject.[3] Justice Harlan said: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[4] Justice Lamar said: "That no part of this legislative power can be delegated by Congress to any other department of the government, executive or judicial, is an axiom in constitutional law, and is universally recognized as a principle essential to the integrity and maintenance of the system of government ordained by the Constitution. The legislative power must remain in the organ where it is lodged by that instrument."[5]

An exception may be claimed to exist here, because

[1] "The legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have." (Locke on Civil Government, Sec. 142.)

[2] Cooley's Constitutional Limitations, 6th ed., p. 137.

[3] 143 U. S., 649.

[4] *Id.*, p. 692.

[5] *Id.*, p. 697.

Congress can concededly delegate to the President, to Cabinet officers or to the courts the power to make mere "rules and regulations," according to our current phraseology; while the right to legislate for the Territories is commonly attributed to the constitutional provision granting power to Congress to "make all needful *rules and regulations* respecting the territory or other property belonging to the United States."[1] There has always been doubt, however, whether this provision has any application to territory acquired since 1789.[2] And the words "rules and regulations" have always been treated in the practical construction of the Constitution as the equivalent of "statutes." Provisions for the Territories have commonly been inserted in statutes mainly intended for the States. Moreover, this special power is expressly confided to Congress as fully as is the general power of legislation, so that if one power can be delegated to the President, it would seem that the other can be delegated to him also.

But while the United States Supreme Court has at various occasions recognized the general principle that legislative power cannot be delegated,[3] it has never yet found it to be applicable to any case that actually came before it for decision; and while the principle as a general principle has been generally recognized in the State courts, the actual number of statutes which have been by them declared unconstitutional is but small, and even of these decisions a majority have either been overruled, or generally disapproved, upon the point decided. In fact, the two cases which Judge Cooley in his shorter work refers to as the leading applications of this constitutional principle,[4] have

[1] Constitution, Art. IV, Section 3.

[2] American Insurance Co. *vs.* Canter, 1 Pet., at pp, 542–3, 546; United States *vs.* Gratiot, 14 Pet., at p. 537; National Bank *vs.* Yankton, 101 U. S., at p. 132. The fullest judicial treatment is in Dred Scott *vs.* Sandford, 19 How., at pp. 432–447, 500–515, 604–615.

[3] Wayman *vs.* Southard, 10 Wheat., 1, 42, per Marshall, *C. J.*; Bank of United States *vs.* Halstead, *Id.* 51, 61; *In re* Rahrer, 140 U. S., 545, 560; Field *vs.* Clark, *supra.*

[4] Cooley on the Constitution, 3d ed., p. 111, citing Barto *vs.* Himrod, 8 N.Y., 483 (declaring a *referendum* to the people of the entire State invalid), and Rice *vs.* Foster, 4 Harringt., 479 (prohibiting local option laws, and similar instances of a *referendum* to the people of a county or municipality). The other case cited is a mere *dictum*, the application of the principle being denied.

both met with a great amount of disapproval by subsequent courts and writers, including Judge Cooley himself.[1] The decisions which were the original supports of the doctrine have thus been knocked from under it. New applications of the principle are still occasionally made by the State courts, however.[2]

In one of the earlier cases upon the power to delegate legislative authority, Chief Justice Marshall said that "the precise boundary of this power is a subject of delicate and difficult inquiry,"[3] and subsequent adjudications, while proving the delicacy and difficulty of the inquiry, and extending to some extent what was at that time supposed to be the probable boundary of the power, have failed to locate the boundary even approximately. The question has several times since Field *vs.* Clark been elaborately argued before the Supreme Court of the United States in cases of importance, but the court has each time found some other point upon which the decision might turn.[4]

Statutes like that considered in Field *vs.* Clark, and statutes submitted to the *referendum*, are enacted by the legislature in complete form, and await only the executive decision or the popular vote to go into operation. But statutes which delegate full legislative power—power to draft the law as well as to give it operation—are also familiar.

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[1] See Cooley's Constitutional Limitations, 6th ed., notes to pp. 142–4, approving passages quoted from State *vs.* Parker, 26 Vt., 357, and Smith *vs.* Janesville, 26 Wis., 291. The Barto case has some support outside of New York, but there is now an immense weight of authority against the Rice case.

[2] Adams *v.* Burdge, 95 Wis., 390; Dowling *vs.* Insurance Co., 92 Wis., 63; O'Neill *vs.* Insurance Co., 166 Pa. St., 71; Sanders *vs.* Southern Electric Ry. Co., 147 Mo., 411, 426–7.

[3] Wayman *v.* Southard, 10 Wheat., 1, 46: "There is perhaps no class of questions ever presented for judicial consideration which involve more real difficulty, or leave greater room for the mind to remain in doubt" (*In re* Oliver, 17 Wis., 681). "The great difficulty exists in the attempt to fix on the precise boundary line between legislative and executive powers in their practical operation. This is not possible. You might attempt the search for the philosopher's stone, or the discovery of the perpetual motion, with as much prospect of success" (Mr. Giles, of Virginia, in the Senate, Annals of Congress, Dec. 21, 1808, p. 259).

[4] United States *v.* Rider, 163 U. S., 132; Lake Shore Railway *v.* Ohio, 165 U. S., 365, 368; Cruickshank *v.* Bidwell, 176 U. S., 73; Rider *v.* United States, 178 U. S., 251, 258–9; see also United States *v.* Keokuk Bridge Co., 45 Fed. Rep., 178; United States *vs.* Rider, 50 Fed. Rep., 406; United States *v.* City of Moline, 82 Fed. Rep., 592.

Thus, the legislature, after indicating the general features of a proposed system of legislation, may delegate the right to work out the details, as by authorizing an executive department to adopt regulations,[1] or by authorizing the judiciary to adopt rules of practice.[2] It may delegate to the officers of a territorial subdivision or municipality very wide powers of legislation for purely local purposes.[3] Nor is Congress confined to the Executive and Judiciary in delegating the power to fix the details of legislation. It may permit such subjects as ascertaining the proper qualifications for transacting business requiring professional skill to be referred to official associations of persons learned in the law, in medicine, or in other skilled vocations.[4]

Broad powers are delegated to Territorial Legislatures, but this is the case also with legislatures of municipalities. It is not essential that a territory, or that a city, should have an elective legislature;[5] but it would be a novelty to delegate the whole legislative power either to a President or to a governor, to be exercised at his discretion through such forms as he might select. In granting all legislative, as well as executive and judicial, authority over the Philippines to the President, as the Spooner bill seems meant to do, it is without precedent. Its introducer said indeed: "It is fashioned after the Louisiana bill. It is fashioned after the Hawaiian resolution."[6] The present bill is to a considerable extent fashioned after the bill of a century ago; but with differences that are radical, as

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[1] *In re* Griner, 16 Wis., 423, and precedents cited; United States *vs.* Bailey, 9 Pet., 238; Caha *vs.* United States, 152 U. S., 211, 219; United States *v.* Ormsbee, 74 Fed. Rep., 207.

[2] Wayman *v.* Southard, 10 Wheat., 1.

[3] Paul *vs.* Gloucester County, 50 N. J. Law, 585, 600; 1 Dillon on Municipal Corporations, Sec. 308.

[4] Scholle *vs.* State, 100 Md., 729, and cases cited; Hewitt *vs.* Charier, 16 Pick., 353; see Dent *vs.* West Virginia, 129 U. S., 114, 122; State *vs.* Heinemann, 80 Wis., 253, 257-8. Standards of importable drugs have for fifty years past been fixed in part by foreign pharmacopœias (U. S. Rev. St., Sec. 2935).

[5] See 1 Stat., 51, *n.* 123, 550; 2 *Id.*, 284.

[6] Congressional Record, May 24, 1900, p. 6690.

may be seen by placing them in parallel columns.[1] There are two differences. The Louisiana act, originally drawn so as to operate like other laws for the indefinite future,[2] was amended on motion of the then leader of the House of Representatives, John Randolph, of Roanoke, so as to have but a temporary effect; and in the language of the mover it "compelled Congress to take early measures for reducing this enormous power delegated to the Executive."[3] Mr. Randolph said: "If we give this power out of our hands, it may be irrevocable until Congress shall have made legislative provision; that is, a single branch of the Government, the Executive branch, with a small minority of either House, may prevent its resumption. He did not believe that under any circumstances it was proper to delegate to the Executive a power so extensive."[4] This emergency measure, so closely restricted in point of time, also delegated little, if any, genuine legislative power to the President. It did not, as now proposed, delegate to him all the powers "necessary to govern" the new territory, but only those powers actually "exercised by the officers of the existing government of the same." The President could grant no new power, although he had some vague authority to regulate the "manner" of exercising the powers already existing. In other words, the Louisiana act was analogous to the now familiar type of legislation which grants power in outline, the outline to be filled in by departmental regulations or

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| Louisiana Act. | Spooner Bill. |
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| *Until the expiration of the present session of Congress,* unless provision for the temporary government of the said territories be sooner made by Congress, all the military, civil, and judicial powers *exercised by the officers of the existing government of the same,* shall be vested in such person and persons, and shall be exercised in such manner, as the President of the United States shall direct for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property and religion (2 Stat., 245). | [After the termination of the insurrection] all military, civil and judicial powers *necessary to govern the said islands* shall, *until otherwise provided by Congress,* be vested in such person and persons and shall be exercised in such manner as the President of the United States shall direct for maintaining and protecting the inhabitants of said islands in the free enjoyment of their liberty, property and religion. |

[2] Annals of Congress, October, 1803, pp. 18, 498.

[3] *Id.*, p. 498.

[4] *Id.*

court rules. This emergency measure was debated but a single day.[1] Although its operation was subsequently extended for a short time,[2] it remained in operation but eleven months, and was never brought to the attention of the courts; and the constitutional objections ably urged by the opposition leader, Roger Griswold, of Connecticut, were defeated largely, doubtless, upon the reasoning above stated.

The Hawaiian annexation resolution[3] went a step further than the Louisiana bill, for it was given an indefinite operation; but it still fell radically short of the Spooner bill, for it, like the Louisiana resolution gave to the President, but a restricted legislative power, if any.[4] I do not think that the Hawaiian resolution is entitled to serious consideration as a precedent. It was pressed through under the excitement of the early period of the Spanish War. It involved new and momentous problems, as for the first time we were annexing a settled and populous land beyond the seas. The constitutional arguments in Congress turned upon the question whether foreign territory could be annexed by act of Congress otherwise than as a State[5], and little, if any, notice was taken in the debate of the question now before us. Moreover, the Hawaiian resolution is too recent to have weight as a practical exposition of the Constitution.

For these reasons I think that the courts, if the constitutionality of Mr. Spooner's measure shall ever come before them for consideration, will not rest their decision upon leg-

[1] Annals, October 27, 1803, pp. 498–514.

[2] Act of Mar. 26, 1804, Chap. 38, Sec. 16.

[3] Joint resolution of July 7, 1898, 30 Stat., 750.

[4] "Until Congress shall provide for the government of such islands all the civil, judicial and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons, and shall be exercised in such manner as the President of the United States shall direct."

[5] Early annexations had been justified by the Courts under the war and treaty making powers. Texas was annexed as a State under the power to admit new States. Power to annex a mere territory by a legislative act had been denied by Senator Thurman and others in the San Domingo debate of 1870, and the question was ably debated on both sides in 1898. The precedent relied upon by the supporters of the resolution was the Guano Islands Act of 1856 (Jones *vs.* United States, 137 U. S., 202, 209, 212). The Hawaiian Supreme Court has since recognized the difficulty of this question in Peacock *vs.* Republic of Hawaii (*supra*).

islative precedents. The question will be an original one, and will be treated as such.

The Guano Islands Act of 1856 delegated to the discretion of the President, unhampered by any rules or limitations, the question whether newly discovered Guano Islands should "be considered as appertaining to the United States." The Supreme Court in sustaining the statute called this "a strictly executive power."[1] It certainly involved a very wide discretion, and upon a most important matter, if the view be correct which treats his affirmative action as annexing the islands to this country.[2]

The above-quoted case of Field *v.* Clark,[3] arising under the McKinley Tariff Act of 1890, is the one in which the Supreme Court has come nearest to marking the boundary within which legislative power may be delegated. While denying the right to delegate, the majority of the Court state in their opinion that the Legislature may provide that a statute shall not take effect until "upon a named contingency," when "the proper occasion exists," upon the occurrence of "some fact or state of things upon which the law makes,or intends to make, its own action depend." They say that the question of fact as to whether the time has arrived may be left to the decision of an executive officer.[4] This seems on a first reading a simple and practicable distinction. If, however, we examine the question thus left to the President's uncontrolled discretion, we find that it was something very different from the ordinary "question of fact" so familiar to a lawyer. It was whether "the government of any country producing and exporting sugars, molasses, coffee, tea and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the *agricultural or other* products of the United States, which *in view of the free introduction of such sugar, molasses, coffee, tea and hides into the United States* he may deem to be *reciprocally* unequal and unreasonable." If he deemed them so, the President was to collect certain specified duties upon imports from that country,

[1] Jones *vs.* United States, 137 U. S., 202, 209, 215.

[2] Hawaiian debate (*supra*).

[3] 143 U. S., 649.

[4] *Id.*, at pp. 692–4.

The Court in its opinion also intimate approval of the act of 1794, authorizing the President to lay an embargo on all ships and vessels in the ports of the United States "whenever, in his opinion, the public safety shall so require;"[1] and of the act of 1799, authorizing the President to resume commercial intercourse with France "if he shall deem it expedient and consistent with the interest of the United States," and to break off intercourse again "whenever, in his opinion, the interest of the United States shall require."[2] According to the doctrine of the Field case, therefore, the execution of a law may be made to depend upon the question whether the President deems it advisable that the law should go into operation.

The Court has recently gone a step farther in the case of Dunlap *v.* United States.[3] That case arose under a law granting a rebate of the tax upon alcohol "under regulations to be prescribed by the Secretary of the Treasury."[4] The Secretary refused to provide regulations, and the Court construed the law as having "left it to the Secretary to determine whether or not such regulations could be framed, and if so, whether further legislation would be required," saying that "it was the statute itself which postponed the existence of the right until the Secretary had prescribed regulations, *if* he found it practicable to do so." The constitutional question was brought to the attention of the Court in this case, which was argued for the claimant by eminent counsel.

It seems to me that in both of these cases there was what the Courts have often called a delegation of legislative discretion. There was no standard provided by which the President should judge whether foreign legislation was "reciprocally" unequal and unreasonable, in

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[1] *Id.*, p. 691.

[2] The Court treats these early laws as a contemporaneous and practical construction of the Constitution; but the constitutional question was raised and debated in Congress a few years later with elaborate examination of the precedents (Annals of Congress, 1807–8, pp. 2198–2241; *Id.*, 1808–9, pp. 245–298, 315), and the language of similar laws was thereafter somewhat modified, perhaps, to meet these objections. "The Reciprocity Acts of 1890. Are they Constitutional?" American Law Register and Review, March, 1892.

[3] 173 U. S., 65.

[4] Tariff Act of August 28, 1894, Sec. 61.

view of the concessions made by us to foreign Governments. It is difficult to see why Congress should not as well provide that the President might remove the articles named into the dutiable list, if he should at any time deem the revenue in need of replenishment, or our industries in need of encouragement. There was no standard provided by which the Secretary of the Treasury should judge whether it was practicable to grant a rebate on alcohol without further legislation. It is difficult to see why Congress should not as well provide that he might discontinue certain tariff or internal revenue duties if they did not pay the cost of collection, or if they caused retaliation by foreign States, or resulted in the control of industries by large combinations of capital.

Both of these so-called questions of fact, and still more those involved in the acts of 1794 and 1799 to which I have alluded, were questions involving the use of that kind of discretion which ordinarily is the basis of legislative action; but in all of these cases, the Legislature thought that the discretion could be more wisely exercised by an executive officer than by itself. And if the Legislature is of that opinion, why should it not have the power to delegate its discretion?

If a given scheme of legislation may be adopted merely in outline, to be filled in by the Executive, and if its operation may be suspended until the Executive shall consider it practicable or fair to foreign nations, or for the best interest of the United States, for the law to have effect, does it follow that a given subject of legislation may be delegated to the Executive altogether, to provide the scheme as well as the details? It is difficult to say why the line should be drawn just short of this, after the previous extensions.[1]

It seems to me that the courts, while repeating indeed the old maxim that legislative power cannot be delegated,

[1] In Martin *vs.* Witherspoon, 125 Mass., 175, the court sustained a delegation to the Executive of the subject of pilotage regulations. The power to remit penalties, originally regarded as legislative (6 U. S. Stat., 3), was delegated to the Secretary of the Treasury at an early date (The *Laura*, 114 U. S., 411, and stat. cit.). To the Executive has been delegated the subject of game laws, and importation of fire arms, in Alaska (U. S. Rev. St., Sections 1955, 1956). Wide powers are delegated to the President by the national health legislation (Rev. St., Section 2494; Food Act of August 30, 1890, Sections 4, 5).

have very nearly overthrown it, and have done so because it was not based on sound reasoning, and has always been impracticable in application. The maxim is, in fact, a restriction upon legislative power. If Congress believes that the practical limitations upon its own time and upon its own means of information are such that all legislation upon one subject or upon all subjects in the Philippine Islands could be better provided by the President through resident commissioners or otherwise than by itself, why should Congress not have the power to make such an arrangement? If it has not the power to delegate a part of its functions when such a delegation is in accordance with public interest, and in accordance with its own wishes, then it seems to me that there is a most serious defect in its authority.[1]

It may be conceded that the Legislature cannot delegate distinctly legislative functions to the Executive, any more than to the Judiciary, without the consent of the latter. No department can be made to do the duties of another department, except by its own consent. It may be conceded also that a statute is conceivable—although perhaps none has ever been actually enacted—which would be incontestably void as a delegation of legislative power. Thus, if we assume that at the end of the second year of a presidential term one of the political parties is in possession of the three branches of the Legislature (President, Senate and House), and that the Senate and House are about to pass into the control of the opposite party by less than a two-thirds' majority, it is conceivable that a law might be enacted delegating the entire legislative power to the President for the remainder of his term, in order that the outgoing party might retain its grip on the Government; and such a statute may be conceded to be unconstitutional.

But if I have correctly construed the Field and Dunlap cases, then every statute is constitutional which evinces upon its face a legislative belief that some executive or judicial officer is better fitted than Congress to prescribe the course of action necessary to effectuate some particular

[1] A similar argument is made by Frear, J., in support of the doctrine that territory may be annexed by a statute or treaty which provides for a transition period before the Constitution and laws of the United States shall have full application, in Peacock *vs.* Republic of Hawaii, *supra.*

result which Congress desires, and such a statute will operate, at least unless the officer upon whom the burden is cast declines to bear it; and perhaps it is not improbable that this principle may be held broad enough even to cover an entire subject such as the internal government of the Philippines—especially if legislation on the lines of the Spooner bill may have the good fortune to come into court strengthened by a mass of rights vested under it, by the *prestige* of a successful colonial establishment, and by the force of public opinion.

If, however, the present Congress fail to pass even such a bill, and if before the assembling of its successor the Philippines may be fortunate enough to see the termination of the war, then there will be no legitimate method of affording any legislation for their needs, however pressing. When the President shall proclaim that peace has come, his present legislative powers will thereupon absolutely cease. Except in the abnormal condition of war, and by virtue of his authority as Commander-in-Chief, the Executive has no legislative power under our Constitution.[1] That power is confided to Congress. Until Congress shall act, the then existing Government and laws of the Philippine Islands, no matter how defective or harmful they may turn out to be, must remain *in statu quo*[2], except, indeed, so far as they are inconsistent with our constitutional guaranties, and therefore void.[3] Whatever legislative powers, if any, may have inhered in the Spanish crown, are not inherited by the President. "Every nation acquiring territory by treaty or otherwise must hold it subject to the Constitution and laws of its own government, and not according to those of the Government ceding it."[4] His powers will be confined to the execution of the hold-over laws, whatever at

[1] I refer of course to domestic territory, not undertaking to discuss his legal position in Cuba, where he is the *de facto* ruler of what is in our courts (whatever it may be in international law) a foreign country.

[2] Cross *vs.* Harrison, 16 How., 164, 195, 198–9; Leitensdorfer *vs.* Webb, 20 How., 176, 178. The President's power was "so long as the war continued" (Texas *vs.* White, 7 Wall., 700, 730). This seems to be admitted by the present Attorney-General (22 Atty. Gen. Op., at p. 549, July 27, 1899).

[3] See Chicago, &c., Ry. Co. *vs.* McGlinn, 114 U. S., 542, 546; Cross *vs.* Harrison, 16 How., at p. 185, quoting Secretary Buchanan.

[4] Pollard's Lessee *vs.* Hagan, 3 How., 212, 225.

that moment they may happen to be. He may indeed, if and so far as a present condition of belligerency may now enlarge his constitutional powers, prevent a judicial decision of his incapacity by delaying his proclamation of peace, pretending that there is war when there is no war; for the judiciary treat his proclamation as conclusive upon such a point, and take no evidence to prove the contrary.[1] But this would be a subterfuge unworthy the head of a great nation, and not, therefore, one which we have a right to expect. If the legislative branch of our Government shall adjourn for nine months on March 4, next without providing for the future rule of the great archipelago which will then have been for nearly two years under our protection, it will have given a strong argument to those who claim that our institutions are unsuited to the responsibilities of a world-encircling empire.

EDWARD B. WHITNEY.

[1] More *vs.* Steinback, 127 U. S., 70, 80; compare United States *vs.* Anderson, 9 Wall., 56, 70; The Protector, 12 Wall., 700; The Three Friends, 166 U. S., 1, 63.